
**THE CONVENTIONAL MISDIAGNOSIS: WHY
“GRIDLOCK” IS NOT OUR CENTRAL PROBLEM AND
CONSTITUTIONAL REVISION IS NOT THE SOLUTION**

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INTRODUCTION

One cannot read a newspaper or listen to a public affairs program today without being bombarded with claims that our government is hopelessly “gridlocked.”¹ With Republicans and Democrats at each other’s throats, we are repeatedly told that Congress cannot enact much-needed legislation on immigration, climate change, or Social Security reform. In fact, Congress cannot even pass continuing resolutions, to say nothing of a comprehensive budget deal. Only at the last moment has Congress taken steps to avoid the “fiscal cliff” and to raise the debt ceiling. And each time it has put off making the more difficult choices needed to address our long-term fiscal plight.

Meanwhile, public confidence in our governing institutions continues to plummet. A recent American Enterprise Institute (AEI) poll found confidence in government at the lowest point in the forty years that question has been asked.² Two-thirds of the public is dissatisfied with the way the nation is being governed, and nearly the same percentage believes that government has a negative effect on their lives. Sixty-three percent attribute the standoff in Washington to politicians being out of touch with their constituents. Most Americans also believe that the federal government wastes over half the money

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¹ Eugene Robinson, *Gridlock’s Many Victims*, WASH. POST, Feb. 18, 2014, at A13; Fareed Zakaria, *Obstructionist Republicans Keep Washington in Gridlock*, ANCHORAGE DAILY NEWS (Feb. 14, 2014), <http://www.adn.com/2014/02/14/3326669/fareed-zakaria-obstructionist.html>, archived at <http://perma.cc/PUC-79XN>.

² Karlyn Bowman & Andrew Rugg, *Deeply Troubling Trends on Attitudes Toward Government: What You May Have Missed in the Poll*, AEI IDEAS (Oct. 10, 2013, 3:08 PM), <http://www.aei-ideas.org/2013/10/deeply-troubling-trends-on-attitudes-toward-government-what-you-may-have-missed-in-the-polls>, archived at <http://perma.cc/TL3F-GM6T>.

it collects in taxes. A 2013 Pew poll indicates that over eighty percent of the public is dissatisfied with the way things are going in this country, and seventy-four percent want to see current members of Congress defeated for reelection.³

Our current political predicament gives renewed prominence and credibility to the old argument that our “Madisonian” constitutional system has become outmoded and is no longer capable of meeting the demands of twenty-first century governance. For well over a hundred years the most common and persistent complaint about the U.S. Constitution has been that by making legislation so hard to pass it invites political stalemate. Our government’s distinctive combination of separation of powers, bicameralism, and localistic representation creates so many veto points in the legislative process that intensely committed minorities can often thumb their noses at popular majorities, and at times produce government paralysis. According to Sanford Levinson, “it should be relatively easy these days to find a wide range of agreement that the American system is impervious to needed changes.”⁴ He attributes “Congress’s inability to pass significant legislation regarding issues about which the public is legitimately worried” to “the structure of the government imposed by the Constitution.”⁵ Many distinguished students of American politics – ranging from Woodrow Wilson and other Progressives at the turn of the twentieth century, to James MacGregor Burns, Lloyd Cutler, Robert Dahl, and James Sundquist in more recent years – have expressed similar criticisms.⁶ Seldom has this argument seemed more compelling that it does now.

This Article argues that the constantly repeated “gridlock” meme misdiagnoses our contemporary ills and, as a result, suggests reforms that are likely to worsen our political health. In a nutshell, our central problem is not that government “can’t get anything done” or that our institutions have become insulated from public opinion, but rather that we are doing so many things and responding to so many political demands that we are incapable of resolving the serious conflicts among them. This difficulty is most obvious with the budget: Congress has responded to intense demands for both more spending and lower taxes, creating a large deficit that puts a huge burden on future generations.

³ *Record Anti-Incumbent Sentiment Ahead of 2014 Elections*, PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS (Oct. 15, 2013), <http://www.people-press.org/2013/10/15/record-anti-incumbent-sentiment-ahead-of-2014-elections>, archived at <http://perma.cc/3MVH-DYUB>.

⁴ SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 38 (2006).

⁵ *Id.* at 26.

⁶ JAMES MACGREGOR BURNS, *THE DEADLOCK OF DEMOCRACY: FOUR-PARTY POLITICS IN AMERICA* 7 (1963); ROBERT A. DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* 163 (2d ed. 2003); JAMES L. SUNDQUIST, *CONSTITUTIONAL REFORM AND EFFECTIVE GOVERNMENT* 10-12 (1986); Lloyd N. Cutler, *To Form a Government*, 59 *FOREIGN AFF.* 126, 127 (1981).

Our political system is actually very good at initiating a wide variety of uncoordinated government programs. Unfortunately, it is not nearly so adept at ensuring that these programs are compatible with one another. Washington, we do have a problem. But it is not the problem most critics of our Madisonian Constitution have identified.

I. WHAT WOULD MADISON DO?

To think seriously about the advisability of constitutional revision in the United States is to engage in a dialogue with the American who thought most deeply about constitutional design: James Madison. In doing so, we must remember that Madison was not happy with several features of our Madisonian Constitution, most notably equal representation in the Senate and the national government's limited control over legislation enacted at the state level.⁷ Nor did Madison labor under the illusion that one could design a constitution suitable for all nations and all times.⁸ His most important contribution was to identify the dilemmas facing those who construct republican constitutions: they must find a way to combine popular government with effective barriers against majority faction; to guarantee government by consent while protecting individual rights; to combine "in their due proportions" the "[e]nergy in government [that] is essential to that security against external and internal danger and to that prompt and salutary execution of the laws" with the "[s]tability in government [that] is essential to national character . . . as well as to that repose and confidence in the minds of the people."⁹ A constitution must both "enable the government to control the governed" and "oblige it to control itself."¹⁰

We can also look to Madison for insights that inoculate us against the powerful prejudices of our own time. Among those prejudices is the notion that our world is changing with unprecedented speed, and that governments and constitutions should constantly be modernized to keep up with these technological, economic, and cultural revolutions. To succeed in curbing temporary public passions and channeling the ambitions of those drawn to politics, Madison argued, it is essential that a constitution be the object of that "*eneration* which time bestows on everything, and without which perhaps the wisest and freest governments would not possess the requisite stability."¹¹ A constitution that is easy to amend and subject to frequent change, he politely suggested to Jefferson, fails to inculcate "those prejudices in its favor which antiquity inspires, and which are perhaps a salutary aid to the most rational

⁷ GREG WEINER, *MADISON'S METRONOME: THE CONSTITUTION, MAJORITY RULE, AND THE TEMPO OF AMERICAN POLITICS* 13-14, 90-95 (2012).

⁸ THE FEDERALIST NO. 37, at 223-24 (James Madison) (Clinton Rossiter ed., 2003).

⁹ *Id.* at 223.

¹⁰ THE FEDERALIST NO. 51, *supra* note 8, at 319 (James Madison).

¹¹ THE FEDERALIST NO. 49, *supra* note 8, at 311 (James Madison) (emphasis added).

Government in the most enlightened age.”¹² Without such continuity and veneration, a constitution is in constant danger of being reduced to a mere “parchment barrier[]”¹³ that can be ignored whenever it becomes inconvenient.

Just as importantly, wise constitution writing requires an unusual level of insulation from the ordinary preoccupations and demands of democratic government.¹⁴ The constitutional convention of 1787 was certainly subject to competing sectional demands, but meeting behind closed doors hundreds of miles from their constituencies allowed its members to engage in deliberation over the long-term interests of the country as a whole and to accept compromise when necessary. It is hard to believe similar insulation, deliberation, and compromise could take place in an era of Twitter and Facebook, Fox News and MSNBC, Ted Cruz and Julian Assange. It is hard to see how a country unable to elect representatives who can agree on a one-year budget could select delegates to a convention capable of producing a framework for governing over the next century or more.

No one can deny that our unusual combination of separation of powers and bicameralism makes passage of major legislation extraordinarily difficult. Before condemning the complexity of our legislative process with its attendant opportunities of delay and sabotage, though, we would do well to remember Madison’s arguments for a constitutional design that makes legislation difficult to enact.

First, Madison argued that the easier it is to pass legislation, the greater the “mutability of the law.”¹⁵ The resulting “public instability” not only undermines public confidence and weakens us internationally, but also gives an “unreasonable advantage” to “the sagacious, the enterprising, and the moneyed few over the industrious and uniformed mass of the people.”¹⁶ When the tax code, campaign finance legislation, or banking and securities regulations are revised, who are the first to take advantage of the shift? Although today we might answer with the all-purpose political curse words, “special interest groups,” a more apt description would still be Madison’s: “the sagacious, the enterprising, and the moneyed few.”

Second, by providing an opportunity for a “sober second thought,” Madison argued bicameralism reduces the possibility that legislation will be the product of momentary public passions. As Greg Weiner has convincingly argued, Madison was committed to majority rule, but insisted that the majorities

¹² WEINER, *supra* note 7, at 59 (quoting Letter from James Madison to Thomas Jefferson (Feb. 4, 1790)).

¹³ THE FEDERALIST NO. 48, *supra* note 8, at 305 (James Madison).

¹⁴ For a particularly compelling explanation of Madison and Hamilton’s thinking in this regard, see MICHAEL GREVE, *THE UPSIDE DOWN CONSTITUTION* 23-43 (2012).

¹⁵ James Madison, *Vices of the Political System of the United States*, in PAPERS OF JAMES MADISON 9:353 (William T. Hutchinson & William M. E. Rachal eds., 1971).

¹⁶ THE FEDERALIST NO. 62, *supra* note 8, at 379 (James Madison).

needed to enact legislation be more than temporary.¹⁷ Because time usually cures intemperate political passions, the wheels of the legislative process should grind slowly. For most critics of the Constitution, majority factions and intense public passions are to be embraced, not thwarted. (At least in the legislative process. Contemporary advocates of majoritarianism generally leave such thwarting to the unelected judiciary.) What Madison described as “[a] rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project,”¹⁸ these critics would no doubt celebrate as the authentic and long submerged voice of the people.

Recent history provides us with many examples of the fickleness of public opinion. As crime rates rose in the 1980s and 1990s, so did public fear of crime, resulting in draconian criminal laws that filled our prisons and leading to equally impassioned attacks on our racist “carceral state” and reckless spending on the prison-industrial complex. Since 9/11, the public has swung from approving ambitious military actions to remake the entire politics of the Middle East, to opposing overwhelmingly a modest effort to punish a regime for using chemical weapons against its own people.¹⁹ In 2008 the electorate gave control of the presidency and both houses of Congress to Democrats committed to universal health insurance. Two years later, voters punished the Democrats for enacting a law very close to universal health insurance. And then they reelected the President whose principal legacy is that very health insurance law. While we might excuse politicians for their craven flattery of voters, those of us not dependent on the whims of voters should be willing to admit that Madison’s reservations about the short-term judgment of the average citizen were well founded.

Contemporary critics of the Constitution not only ignore Madison’s warning about the “mutability of the law,” but also insist that the dangers created by government inaction are far greater than those created by rash, premature, or intemperate action. They assume – contrary to overwhelming political science evidence²⁰ – that government’s mistakes can be easily remedied. Most government programs create constituencies that are highly organized, acutely aware of the benefits they receive from government, and strategically positioned to block substantial change. As Paul Pierson has written, “[t]he well-documented imbalance between the way that voters react to losses and

¹⁷ See WEINER, *supra* note 7.

¹⁸ THE FEDERALIST NO. 10, *supra* note 8, at 79 (James Madison).

¹⁹ Compare Richard L. Berke & Janet Elder, *A Nation Challenged: The Poll; Poll Finds Support for War and Fear on Economy*, N.Y. TIMES, Sept. 25, 2001, at A1 (describing an increase in public support for military force following the 9/11 terrorist attacks), with Mark Landler & Megan Thee-Brenan, *Survey Reveals Scant Backing for Syria Strike*, N.Y. TIMES, Sept. 10, 2013, at A1 (“A broad majority of Americans, exhausted by nearly a dozen years of war and fearful of tripping into another one, are opposed to a military strike on Syria.”).

²⁰ For an extensive review of this evidence, see PETER H. SCHUCK, WHY GOVERNMENT FAILS SO OFTEN AND HOW IT CAN DO BETTER 172-82 (2014).

gains further enhances the political position of retrenchment opponents.”²¹ In short, delays are temporary, but mistakes last forever.

II. FROM STALEMATE TO GRIDLOCK

For most of the twentieth century the “deadlock” or “stalemate” argument was voiced almost exclusively by those on the left. Progressives and New Dealers argued that our “horse and buggy” institutions prevented the United States from building a modern state. By “modern state,” they meant a generous welfare state and a national government capable of regulating large corporations and moderating swings in the business cycle. Although Progressives and most New Dealers showed little interest in civil rights, their successors could see that the same features of our Constitution that led to deadlock on these issues also prevented the federal government from dislodging the racial caste system in the South. Their strategy was to use a combination of presidential leadership and party government to overcome all the veto points in the legislative process. With the policy “breakthroughs” of the New Deal in 1933–35 and civil rights in 1964–65, they largely succeeded.²² Once these landmark pieces of legislation were enacted, it became much easier for the President, Congress, administrative agencies, and the states to engage in incremental expansion of the welfare state, regulatory agencies, and civil rights programs. Despite divided government, the scope of federal authority grew substantially in the 1970s.²³ “Stalemate” and “deadlock,” terms so frequently used to describe congressional politics in previous decades, were briefly out of fashion.

In the Reagan years the old critique of our constitutional system reappeared with a new twist and a new title: gridlock. The term “gridlock” came into common use in 1980 to describe traffic congestion so severe that cars would block multiple intersections, preventing movement in any direction.²⁴ It quickly became the leading metaphor used to describe congressional politics after Ronald Reagan’s initial legislative victories in 1981. Hugh Heclo has aptly described one of the chief consequences of the expansion of the government agenda in the 1960s and 1970s as “policy congestion.”²⁵ As the

²¹ PAUL PIERSON, *DISMANTLING THE WELFARE STATE?: REAGAN, THATCHED, AND THE POLITICS OF RETRENCHMENT* 18 (1994).

²² See HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY, 1960-1972* (1990).

²³ R. Shep Melnick, *From Tax and Spend to Mandate and Sue: Liberalism After the Great Society*, in *THE GREAT SOCIETY AND THE HIGH TIDE OF LIBERALISM* 387 (Sidney Milkis & Jerome Mileur eds., 2005).

²⁴ *Gridlock*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Gridlock> (last updated Sept. 26, 2013), archived at <http://perma.cc/DG7D-9MD7>.

²⁵ Hugh Heclo, *One Executive Branch or Many?*, in *BOTH ENDS OF THE AVENUE: THE PRESIDENCY, THE EXECUTIVE BRANCH, AND CONGRESS IN THE 1980S*, at 26, 32 (Anthony King ed., 1983).

government does more and more, policies intersect with one another with greater frequency, often pushing in different directions. Our so-called “energy policy” is a motley collection of hundreds of conflicting policies and programs, some decades old, that seeks to promote and discourage, subsidize and tax various forms of energy use and production. Our “welfare policy” is an array of programs, run by many different agencies under the jurisdiction of scores of congressional committees, that is notorious for creating inconsistent rules and conflicting incentives for recipients.²⁶ Much the same could be said for our “healthcare policy,” which in turn is inextricably linked to welfare policy.²⁷ And our “budget policy” is the sum of the millions of decisions on spending and taxing that hundreds of governments – local, state, and national – make every year.

The term “gridlock” captured the sense that the government could no longer manage or coordinate all the intersecting programs it had created in the preceding decades. This was particularly true for budget policy during the Reagan years. The Reagan tax cuts and military build-up had created massive deficits (by pre-2001 standards), and the “obstacle course on Capitol Hill”²⁸ seemed incapable of putting much of a dent in them. No longer was the complaint that Congress and the President could not build an extensive modern state. Now the complaint was that Congress and the President could not manage or control the massive state they had created. Especially with entitlement spending growing automatically due to cost-of-living adjustments, rapidly escalating healthcare costs, and an aging population, inaction by Congress meant an ever-larger federal budget. Now conservatives and good-government technocrats complain as much about “gridlock” as liberals had complained of “stalemate” in years gone by.

The liberals who complained about “stalemate” in the 1950s and 1960s thought they knew what to do about it: develop a “responsible” two-party system and change the rules of the legislative process to allow the majority party to govern. Decades later they got their wish, but not the results they expected. In the late 1970s and early 1980s, we began to develop unified, national, programmatic political parties. The fierce partisan polarization, which became so evident in early twenty-first century American politics, first appeared in Congress two decades earlier. By the time the Republicans took control of Congress in 1995, party leadership in the House rivaled that of the period of “Czar” Cannon and “Czar” Reed nearly a century before. Within the House, most of the veto points so frequently decried for promoting stalemate were eliminated. The speaker now controls the Rules Committee. The speaker

²⁶ See, e.g., CHRISTOPHER HOWARD, *THE WELFARE STATE NOBODY KNOWS: DEBUNKING MYTHS ABOUT U.S. SOCIAL POLICY* 1 (2007) (describing U.S. welfare programs reflecting “fragmentation of public authority within and among institutions”).

²⁷ See, e.g., PIERSON, *supra* note 21, at 132-42 (describing the inter-relationship of various healthcare and welfare programs in the United States).

²⁸ ROBERT BENDINER, *OBSTACLE COURSE ON CAPITOL HILL* (1964).

tells committees which bills to report, and determines which bills will come to the floor and in what form. Roll call votes on important issues almost always follow party lines.²⁹

During the presidency of George W. Bush, Republicans briefly gained control of both the House and the Senate, and rammed through Congress a series of tax cuts and a major expansion of Medicare with virtually no support from Democrats.³⁰ In 2009–10, Democrats enacted the Affordable Care Act and the stimulus bill in a similar fashion.³¹ Although partisan polarization is almost always listed as a primary cause of gridlock, it is undeniable that it has also contributed to dramatic policy change.

Advocates of party government had assumed that stronger, more ideological parties would allow one dominant party to give coherent direction to the government as a whole. For better or for worse, in the long run the public has not been enamored of either party, and the result has been years of divided government (1981–1992, 1995–2002, 2007–2008, and 2010–??). Indeed, as soon as one party seemed to be gaining effective control of government, the voters revoked its mandate. The 2010 and 2012 elections were just the latest and most dramatic manifestation of this dynamic. This recurring pattern has led some analysts to conclude that American voters are “cognitive Madisonians” who wish to prevent either party from dominating.³² It is probably more accurate to say that voters are both seriously divided and deeply ambivalent. A significant majority want to retain – and even extend – the entitlements, services, and protections offered by our large regulatory and welfare state, but they do not want to bear the taxation, regulation, and limitations on individual choice this requires.

Once seen as a way to overcome the problems associated with bicameralism and separation of powers, in practice political parties often magnify their effects. In 1978 Anthony King noted that American politics seemed to imitate the behavior of large crowds: it oscillates between moving “either very sluggishly or with extreme speed.”³³ Partisan polarization has exaggerated both phases of our political system’s manic-depressive behavior. During our rare periods of unified government, the majority party’s program moves through

²⁹ BARBARA SINCLAIR, PARTY WARS: POLARIZATION AND THE POLITICS OF NATIONAL POLICY MAKING 1-35 (2006).

³⁰ THOMAS E. MANN & NORMAN J. ORNSTEIN, THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK 6 (2006); SINCLAIR, *supra* note 29, at 156.

³¹ See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (to be codified primarily in scattered sections of 42 U.S.C.); American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115.

³² Michael S. Lewis-Beck & Richard Nadeau, *Split-Ticket Voting: The Effects of Cognitive Madisonianism*, 66 J. POL. 97, 97 (2004).

³³ Anthony King, *The American Polity in the Late 1970s: Building Coalitions in the Sand*, in THE NEW AMERICAN POLITICAL SYSTEM 371, 393 (Anthony King ed., 1978).

Congress at a speed unimaginable in the days of the “committee barons.” When we return to the normalcy of divided government, congressional activity on important legislation grinds to a halt until a crisis of some sort forces the parties to reach short-term compromises. The gridlock metaphor captures only one phase of our political mood swings.

Today “gridlock” is like the weather, everyone complains about it, but no one knows what to do – other than try to clobber the other party in the next election. Not surprisingly, attacking and blaming the other party has become the main activity of members of Congress in our highly volatile political environment. Ever eager to blame “out of touch” politicians for the nation’s woes, voters have continued to elect fierce partisans while they fiercely condemn partisanship. Blame casting and blame avoidance have become as common among average citizens as among politicians.

What makes this situation particularly ominous, of course, is the long-term fiscal condition of the federal government. Not only do we face a large deficit in the short-term, but the red ink is likely to rise further as a result of our aging population and escalating health care costs.³⁴ Many state governments are in even worse fiscal shape than the federal government.³⁵ These are problems faced by almost all advanced industrial democracies. Democracies find it particularly hard to impose losses – either in terms of greater taxation or entitlement reductions – on their citizens.³⁶ But imposing losses becomes even harder when neither party is firmly in control and blame casting is the most effective tactic for each.

III. WHAT GRIDLOCK? A LOOK BACK AT 2001–2012

It is hard not to become exasperated by a Congress that cannot enact appropriations bills and that regularly threatens to leave the government unable to pay its debts. But is it true that the combination of our Madisonian system and partisan polarization has created a situation in which, as we so frequently hear, “government can’t get anything done”?

Consider, for example, some of the steps the federal government took in response to the financial crisis of 2008:

- In the fall of 2008 Congress passed a \$700 billion financial rescue package.³⁷ The Bush Administration managed to push its proposal through

³⁴ William Galston, *The Long Term Is Now*, DEMOCRACY, Fall 2012, at 60.

³⁵ Michael S. Greve, *Our Federalism Is Not Europe’s. It’s Becoming Argentina’s*, 7 DUKE J. CONST. L. & POL’Y 17 (Special Issue 2012).

³⁶ See Kent Weaver & Bert A. Rockman, *When and How Do Institutions Matter?*, in DO INSTITUTIONS MATTER? GOVERNMENT CAPABILITIES IN THE UNITED STATES AND ABROAD 445, 455 (Kent Weaver & Bert A. Rockman eds., 1993); see also PIERSON, *supra* note 21, at 13.

³⁷ Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (codified at 12 U.S.C. §§ 5201-5202, 5211-5241, 5251-5253, 5261 (2012)).

Congress despite massive Republican defections. Not only was the banking system quickly stabilized, but most of this money has been repaid.³⁸

- With only tepid support from the White House, Congress bailed out – and essentially took over – Fannie Mae and Freddie Mac,³⁹ adding several hundred billion dollars to the total bailout.
- A few months later the Treasury Department and the Federal Reserve announced a plan to pump an additional one *trillion* dollars into the banking system.⁴⁰ This was done without additional congressional authorization.
- After providing billions of dollars to keep GM and Chrysler afloat, the federal government played a central role in managing their bankruptcy and downsizing.⁴¹
- In the fall of 2008 Congress passed a \$150 billion stimulus package – large by historical standards, if small in comparison with the \$800 billion stimulus package enacted a few months later.⁴²

And this was just the beginning: The congressional effort to restructure the financial services sectors was yet to come. The United States has probably responded to the Great Recession more prudently than have parliamentary governments in Europe.⁴³ One can question the wisdom of these measures. But gridlock they clearly ain't.

One could respond to these remarkable events by saying that the American political system is capable of responding to emergencies, but not very good at fashioning policies that prevent such emergencies from striking in the first place. So let us look back at the first seven years of the Bush Administration. Here, it seemed, was a recipe for stalemate. The electorate was divided fifty-fifty in both the 2000 and 2004 presidential elections, with George W. Bush narrowly losing the popular vote in 2000 and eking out a slim victory in 2004. The Senate, too, was divided fifty-fifty in 2001, but soon shifted to the Democrats with the defection of Senator Jeffords. The Republican margin in the House after the 2000 election was only nine votes, producing the smallest

³⁸ U.S. CONG. BUDGET OFFICE, REPORT ON THE TROUBLED ASSET RELIEF PROGRAM—OCTOBER 2012, at 2 (2012), *archived at* <http://perma.cc/VQ37-7A7J>.

³⁹ Press Release, U.S. Dep't of the Treasury, Statement by Secretary Henry M. Paulson, Jr. on Treasury and Federal Housing Finance Agency Action to Protect Financial Markets and Taxpayers (Sept. 7, 2008), *archived at* <http://perma.cc/Z3B-BPPQ>.

⁴⁰ Edmund L. Andrews, *Fed Will Inject \$1 Trillion More to Aid Economy*, N.Y. TIMES, Mar. 19, 2009, at A1; Edmund L. Andrews, *U.S. Plans \$800 Billion in Lending to Ease Crisis*, N.Y. TIMES, Nov. 26, 2008, at A1.

⁴¹ U.S. CONG. BUDGET OFFICE, *supra* note 38, at 6; U.S. DEP'T OF THE TREASURY, TROUBLED ASSET RELIEF PROGRAM: MONTHLY REPORT TO CONGRESS – DECEMBER 2012 (2013), *archived at* <http://perma.cc/9Y7B-ED4F>.

⁴² 2008 Legislative Summary: 110th Congress' Second Session Highlights, CQ WKLY., Dec. 8, 2008, at 3242.

⁴³ See Pietro S. Nivola, *Two Cheers for Our Peculiar Politics: America's Political Process and the Economic Crisis*, BROOKINGS (May 21, 2012), www.brookings.edu/research/papers/2012/05/21-economy-politics-nivola, *archived at* <http://perma.cc/GFU-466R>.

partisan margin in both houses in seventy years.⁴⁴ In the 2006 congressional election the Democrats regained control of both the House and the Senate, and the country returned to a divided government. Animosity between the parties (and against the President) ran unusually high. But consider what Congress accomplished during these years:

- It enacted No Child Left Behind (NCLB), the biggest change in federal education policy since 1965 and the most prescriptive federal education legislation ever enacted.⁴⁵
- It created Medicare Part D, the largest entitlement expansion since passage of Medicare and Medicaid in 1965.⁴⁶
- It passed the Bush Administration's tax cuts in 2001, 2003, and 2004. Together they constituted one of the largest tax cuts in history.⁴⁷
- Despite substantial opposition from Republicans, Congress approved the McCain-Feingold campaign finance reform law,⁴⁸ which rivals the 1974 campaign finance statute for the most important piece of legislation ever passed on the subject.
- It enacted the Sarbanes-Oxley Act of 2002, which *CQ Weekly* at the time described as "the biggest increase in the regulation of publicly traded companies since the depression."⁴⁹
- In these years Congress also extended free trade agreements to Central America, eliminated tobacco subsidies, passed several laws to limit tort litigation, enacted a major farm bill, extended the Voting Rights Act for another twenty-five years, and expanded federal funding for children's health insurance.⁵⁰

Some of these laws received bipartisan support (most notably NCLB and Sarbanes-Oxley). Passage of others, however, relied almost entirely on

⁴⁴ MANN & ORNSTEIN, *supra* note 30, at 123.

⁴⁵ No Child Left Behind Act of 2001, 20 U.S.C. § 6301 (2012).

⁴⁶ Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, 117 Stat. 2088 (relevant sections codified as amended in scattered sections of 42 U.S.C.); see SINCLAIR, *supra* note 29, at 143-46 (describing the passage of the bill).

⁴⁷ See MANN & ORNSTEIN, *supra* note 30, at 122-28.

⁴⁸ Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified in scattered sections of 2, 12, 18, 28, 36 & 47 U.S.C.); see also MANN & ORNSTEIN, *supra* note 30, at 180-81; *Highlights: 107th Congress, Second Session*, CQ WKLY., Dec. 7, 2002, at 3176.

⁴⁹ See Sarbanes Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15 and 18 U.S.C.); *Highlights: 107th Congress, Second Session*, *supra* note 48, at 3176.

⁵⁰ Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (codified as amended at 42 U.S.C. §§ 1971, 1973); *Legislative Highlights: 108th Congress, Second Session*, CQ WKLY., Dec. 4, 2004, at 2837; *Highlights: 109th Congress, First Session*, CQ WKLY., Jan. 2, 2006, at 16.

Republican votes (like the tax cuts and Medicare Part D).⁵¹ While many of us consider some of these policies ill advised and excessively partisan, no one would describe these as “do nothing” Congresses.

Foreign and defense policy rarely come up in discussions of stalemate and gridlock. Like partisanship in days gone by, the gridlock conceit stops at the water’s edge. But the ability of the world’s most powerful nation to act decisively is of no little import. So let us add to the list of policy innovations, the highest priority of the Bush Administration:

- Prolonged wars in Afghanistan and Iraq.
- Creation of the Department of Homeland Security.⁵²
- Enactment of the USA PATRIOT Act in 2001 and overhaul of the Federal Intelligence Surveillance Act in 2008.⁵³
- Established the detention center in Guantanamo Bay, followed by passage of legislation banning torture, establishing military commissions to try detainees, and denying detainees held outside the United States the right to file habeas corpus petitions.⁵⁴

Despite the Bush Administration’s provocative arguments about the “unitary executive,” most of these policies received some form of congressional approval.

One of the most important characteristics of our constitutional system – one highlighted by the founders, particularly Hamilton – is that it *reduces* the prospects of stalemate and instability in foreign affairs. Any serious discussion of the American Constitution’s tendency to create stalemate or gridlock needs to pay at least as much attention to foreign policy as domestic. When one looks at the sweep of American foreign policy over the course of the past hundred years – most importantly the pivotal role the United States played in defeating two vicious and expansionist totalitarian powers, but also our post-9/11 success in preventing further attacks on American soil – it is hard to deny that our constitutional structure has served us pretty well. Ironically, many of those who criticize our Constitution for promoting gridlock at home also fault it for creating an “unconstrained” President who “can all too easily engage in dramatic exertions of power, especially in the realm of foreign policy.”⁵⁵ As Jack Goldsmith’s recent book convincingly demonstrates, the executive branch

⁵¹ MANN & ORNSTEIN, *supra* note 30, at 122-28, 130, 137; SINCLAIR, *supra* note 29, at 143-46.

⁵² Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2153 (codified as amended at 6 U.S.C. §§ 101-601 (2012)).

⁵³ See Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 24,667 (codified in scattered sections of 50 U.S.C.); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of 8 U.S.C.).

⁵⁴ BENJAMIN WITTES, LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR 151-82 (2008).

⁵⁵ LEVINSON, *supra* note 4, at 108.

is far more constrained by legal rules and institutional checks than such rhetoric and the conventional wisdom suggest.⁵⁶ Nonetheless, on national security issues it remains capable of acting aggressively, especially in emergencies.

The greatest challenge to the gridlock argument came from 111th Congress of 2009-11, which compiled a record that rivals the famed 89th Congress of 1965-66. While many of these enactments are well known, it is worth recounting them to indicate the sweep of congressional action:

- Most importantly, Congress passed a massive and controversial overhaul of the American health care system extending coverage to thirty million Americans; imposing extensive mandates on insurance carriers, employers, and state government; creating new insurance exchanges; imposing an array of new taxes, fees, and penalties; extending drug benefits; expanding Medicaid; and making significant cuts in the current Medicare program.⁵⁷
- A few months later Congress enacted Dodd-Frank, a 1500-page law written to create a new regulatory structure for the entire financial services sector and to establish a mechanism for “winding down” failing banks and brokerage houses.⁵⁸ According to *CQ Weekly*, Dodd-Frank “touches just about every major piece of financial regulatory law of the 20th century, from the New Deal era banking and securities acts to the post-savings and loan crisis legislation of the late 1980s and early 1990s.”⁵⁹ The law requires regulatory agencies, including the new Bureau of Consumer Financial Protection and Financial Stability Oversight Council, to produce 250 additional sets of regulations to govern the financial sector.⁶⁰
- Soon after convening Congress passed the American Recovery and Reinvestment Act (the stimulus package) to pump an additional \$800 billion into the slowing economy. The Act included tax cuts, an extension of unemployment benefits, grants to the states for infrastructure and health care, and measures to encourage the development of clean energy. It also provided over \$4.5 billion for the Obama Administration’s “Race to the Top” initiative to encourage innovation in elementary and secondary education.⁶¹

⁵⁶ JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11* (2012).

⁵⁷ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (to be codified primarily in scattered sections of 26 & 42 U.S.C.).

⁵⁸ Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of 12 U.S.C.).

⁵⁹ Steven Sloan & Charlene Carter, *Historic Overhaul in Final Stretch*, *CQ WKLY.*, June 28, 2010, at 1572.

⁶⁰ Dodd-Frank.

⁶¹ American Recovery and Reinvestment Act of 2009 (ARRA), Pub. L. No. 111-5, 123 Stat. 115 (codified in scattered sections of 26 & 42 U.S.C.).

- During this time, Congress also passed legislation authorizing the Food and Drug Administration to regulate the content and marketing of tobacco products.⁶²
- The Senate confirmed two new Supreme Court justices, Sonia Sotomayor and Elena Kagan, both by wide margins and without the threat of a filibuster.⁶³

On top of all this the Obama Administration substantially increased our military commitment in Afghanistan, the second major American war zone “surge” in recent years. 2009 and 2010 were certainly years of partisan animosity, but hardly of gridlock.

To be sure, Congress failed to pass immigration legislation (even the stripped-down “Dream Act”),⁶⁴ and the omnibus, jerrybuilt climate change bill passed by the House died quietly in the Senate. Obamacare passed only by the skin of its teeth. When Scott Brown won the Senate seat that had long been held by the Senate’s strongest advocate for universal health care, Edward Kennedy, the Democrats lost the crucial sixtieth vote for cloture. Healthcare legislation passed only because the Democrats were both lucky – the Massachusetts election came after the Senate had approved its version of the bill – and willing to employ the budget reconciliation process in a novel manner.⁶⁵ This serves as a reminder that although partisan polarization often leads one party to engage in obstructionism, it also impels the other party to revise the rules to counteract such obstructionism.

The Perils-of-Pauline healthcare story points to another shortcoming of the conventional gridlock narrative. “Gridlock” is almost always used to imply that an obstinate minority is frustrating the will of the majority. But in 2010 Obamacare was in grave danger for the opposite reason, that is, because public opinion was turning against it.⁶⁶ Democrats from “purple” districts began to sense that a vote for the bill would end their tenure in Washington.⁶⁷ In many

⁶² Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act), Pub. L. No. 111-31, 123 Stat. 1776 (2009) (codified in 21 U.S.C. § 387a-t).

⁶³ Amy Goldstein & Robert Barnes, *Senate Committee Endorses Sotomayor; Just One Republican Sides with Democrats in Backing the Supreme Court Nominee*, WASH. POST, July 29, 2009, at A3; Karl Huse, *Senate Confirms Kagan in Partisan Vote*, N.Y. TIMES, Aug. 6, 2010, at A1.

⁶⁴ Development, Relief, and Education for Alien Minors Act (DREAM Act), S. 1545, 111th Cong. (2010).

⁶⁵ LAWRENCE R. JACOBS & THEDA SKOCPOL, HEALTH CARE REFORM AND AMERICAN POLITICS: WHAT EVERYONE NEEDS TO KNOW 50-120 (2012).

⁶⁶ *Public Approval of Health Care Law*, REAL CLEAR POLITICS, http://www.realclearpolitics.com/epolls/other/obama_and_democrats_health_care_plan-1130.html (last visited Feb. 26, 2014), archived at <http://perma.cc/8Q9D-SWRL>. During the winter of 2010, forty to forty-five percent of those polled favored Obamacare, while fifty to fifty-five percent opposed it. *Id.*

⁶⁷ Alex Wayne & Drew Armstrong, *Election Upsets Overhaul Plans*, CQ WKLY., Jan. 25, 2010, at 236, 237.

instances this proved to be correct. The 2010 Massachusetts Senate race became a referendum on the Administration's healthcare bill. It would have been hard for Democrats to pick a more favorable forum for such a referendum: the election took place in one of the most liberal and reliably Democratic states in the nation – a state in which a similar program had already been enacted; the seat was formerly held by a highly popular Senator who had made universal health care his life's work; and it was a contest between a visible, experienced Democrat and an unknown Republican.⁶⁸ But then, Scott Brown won anyway, providing the first tangible evidence of the degree of public dissatisfaction with the Democrats' healthcare plan. The next indication came in 2010, when the Democratic Party experienced what President Obama described as a "shellacking."⁶⁹ If anything, the healthcare battle shows that the federal government is capable of taking dramatic action even when the public support for such action is shallow.

Over the past three years, the Republicans have controlled the House and an extraordinarily combative anti-Obama minority has dominated the Republican caucus. As a result, in early 2013 we stood at the edge of the "fiscal cliff." But as Jonathan Rauch has written, "[a] funny thing happened on the way to legislative gridlock and fiscal meltdown. In paralyzed, polarized Washington, where Democrats refuse to reduce spending without revenue increases that Republicans peremptorily reject, Democrats have accepted spending cuts, Republicans have accepted tax increases, and deficits have come down."⁷⁰ "The cumulative effect of Washington's serial muddling," Rauch notes, "has been to stabilize the national debt as a share of gross domestic product over the coming decade."⁷¹ It is true that the process was ugly and the budget cuts arbitrary, but the fiscal cliff deal followed the contours of public opinion.⁷² Moreover, as Pietro Nivola has pointed out, divisions within Congress prevented the United States from imposing austerity measures during the Great Recession. As a result, in the United States the economy has fared better than in many European nations.⁷³ In late 2013 Republicans and Democrats in Congress agreed to a deal that reduced the likelihood of future government shutdowns.⁷⁴ This shows that our Madisonian system works better in the long run than our contemporary instant-analysis political culture appreciates.

⁶⁸ *Id.*; Alex Wayne & Edward Epstein, *Obama Seals Legislative Legacy with Health Insurance Overhaul*, CQ WKLY., Mar. 29, 2010, at 748.

⁶⁹ Peter Baker & Carl Hulse, *The Great Divide: Obama and G.O.P.*, N.Y. TIMES, Nov. 3, 2010, at A1.

⁷⁰ Jonathan Rauch, *Rescuing Compromise*, 2013 NAT'L AFF. 115, 115 (2013).

⁷¹ *Id.*

⁷² Pietro S. Nivola, *To Fathom the Fiscal Fix, Look in the Mirror*, BROOKINGS (Jan. 7, 2013, 11:00 AM), <http://www.brookings.edu/blogs/up-front/posts/2013/01/07-fiscal-fix-nivola>, archived at <http://perma.cc/B77C-SB9L>.

⁷³ Nivola, *supra* note 43.

⁷⁴ In October, 2013 Congress created the first budget conference committee in four years,

IV. FROM VETO POINTS TO OPPORTUNITY POINTS

If our Constitution creates so many “veto points,” how have we managed to build such a large welfare, regulator, civil rights, penal, and national security state? Part of the answer is that a combination of presidential leadership, party loyalty, and crisis (especially war and depression) have frequently created the super-majorities necessary to overcome the hurdles established by the Constitution. But that is not the whole picture. One of the most serious weaknesses of the “gridlock” argument is that it focuses so intently not just on domestic policy, but on one small part of domestic policy, namely passage of major pieces of legislation at the national level. Lost in these all-too-abstract discussions are the daily decisions of administrators, judges, state and local officials, as well as members of Congress engaged in the quotidian business of passing appropriations, reauthorizations, and budget reconciliation bills. Taken individually, these decisions might seem trivial, but collectively they can produce major policy change. Critics of the Constitution overlook the enormously important fact that a political system that creates multiple “veto points” simultaneously creates multiple points of access for policy entrepreneurs and assorted claimants. Every “veto point” that can be used to block action is also an “opportunity point” that can be used to initiate or augment government action. As a result, the American government is both more extensive and more innovative than its critics recognize.⁷⁵

Consider, for example, the problem of global warming, widely considered a prime example of gridlock in (in)action. The Bush Administration and Congress have repeatedly been condemned for failing to take significant action to reduce carbon emissions. In 2009 the House passed a bill that combined a mishmash of regulatory requirements with a cap-and-trade program that would have had little bite for many years.⁷⁶ By the time the bill emerged from the House, even environmental groups questioned its merits.⁷⁷ Mercifully, it died in the Senate.⁷⁸

Meanwhile, though, a number of state governments have taken steps to reduce emission of greenhouse gasses. Seven northeastern states reached an accord promising to reduce power plant emissions by ten percent by the year

and that committee negotiated a compromise budget resolution that passed both houses. See David Newhauser & Humberto Sanchez, *Compromise Is No Big Deal*, CQ WKLY., Dec. 16, 2013, at 2082.

⁷⁵ For a particularly convincing argument on this point, see HOWARD, *supra* note 26.

⁷⁶ American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009); see PHILIP A. WALLACH, GOVERNANCE STUD. AT BROOKINGS, U.S. REGULATION OF GREENHOUSE GAS EMISSIONS 4 (2012), *archived* at <http://perma.cc/L6K-HPK7> (describing the procedural history of the bill).

⁷⁷ John M. Broder, *Adding Something for Everyone, House Leaders Gained a Climate Bill*, N.Y. TIMES, July 1, 2009, at A20; John M. Broder, *House Backs Bill, 219-212, to Curb Global Warming*, N.Y. TIMES, June 27, 2009, at A1.

⁷⁸ WALLACH, *supra* note 76, at 4.

2020.⁷⁹ In the summer of 2006 California Governor Arnold Schwarzenegger signed an agreement with British Prime Minister Tony Blair to curb global warming by promoting clean-burning fuels. The Governor asserted, “California will not wait for our federal government to take strong action on global warming;” California has a responsibility “to be a world leader on this issue.”⁸⁰

More importantly, in 2007 the Supreme Court ordered Environmental Protection Agency (EPA) to regulate greenhouse gasses.⁸¹ As an interpretation of the Clean Air Act, the Court’s decision was bizarre: that law is clearly designed to improve *local* ambient air quality, not to reduce the United States’ contribution to a global environmental problem unrelated to the quality of the air we breathe. When Congress enacted the mammoth Clean Air Act Amendments of 1990, it required EPA to study the problem of global warming, but included no provisions to regulate greenhouse gasses (GHGs).⁸² There can be little doubt but that five Justices on the Court had decided that since Congress was not addressing this pressing problem, the judicial and executive branches should.⁸³

EPA’s first response to *Massachusetts v. EPA* was to issue new emissions and fuel-efficiency standards for motor vehicles.⁸⁴ These rules, it should be noted, were even stricter than those considered but rejected during the debate over the 1990 amendments.⁸⁵ The Obama Administration then confronted the more difficult task of applying GHG rules to stationary sources, most importantly gas- and coal-fired power plants. The lack of fit between the GHG problem and the law’s regulatory structure made it hard to develop workable rules. But the worse the EPA proposal, the better the prospect for congressional action: if Congress failed to act, EPA’s flawed plan became the

⁷⁹ BARRY G. RABE, STATEHOUSE AND GREENHOUSE: THE EMERGING POLITICS OF AMERICAN CLIMATE CHANGE POLICY 1-37 (2004).

⁸⁰ Deborah Schoch & Janet Wilson, *Governor, Blair Reach Environmental Accord: Schwarzenegger, Saying the State ‘Will Not Wait’ for Federal Government to Act on Global Warming, Signs Pact with British Prime Minister*, L.A. TIMES, Aug. 1, 2006, at B3.

⁸¹ *Massachusetts v. EPA*, 549 U.S. 497, 533-34 (2007).

⁸² Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399; WALLACH, *supra* note 76, at 6.

⁸³ Justice Stevens wrote the majority opinion with Justices Kennedy, Souter, Ginsburg, and Breyer joining the opinion and Justices Roberts, Scalia, Thomas, and Alito dissenting. *See Massachusetts*, 549 U.S. at 501.

⁸⁴ WALLACH, *supra* note 76, at 7-9 (citing Greenhouse Gas Emission Standards and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles, Final Rule, 76 Fed. Reg. 57,106 (Sept. 15, 2011); Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, Final Rule, 75 Fed. Reg. 25,323 (May 7, 2010)) (discussing the regulations that EPA made after the *Massachusetts v. EPA* case).

⁸⁵ *See id.* at 9 n.31 (pointing out that the regulation effectively served to “belatedly institute the provisions that were rejected during the negotiations to pass the 1990 Amendments”).

default position. In early 2009 a *New York Times* article on climate change legislation noted that President Obama was “holding in reserve a powerful club to regulate carbon dioxide emissions through executive authority.”⁸⁶ Although administration officials insisted that “they would much prefer that Congress write new legislation,” it was clear that they were holding administrative action “in reserve as a prod to reluctant lawmakers.”⁸⁷ We have seen this pattern of judicial initiation, administrative rulemaking, and congressional acquiescence play out before: that is how the large air pollution control program called Prevention of Significant Deterioration came into being over thirty years ago.⁸⁸

Once Republicans retook the House in 2010 and any hope for congressional action evaporated, EPA and the White House were forced to develop detailed regulations for coal- and gas-fired power plants that would substantially reduce greenhouse gasses without becoming administratively unmanageable. The agency proposed these rules on carbon capture and sequestration in the spring of 2012, and indicated that it would issue final, legally binding rules in the fall of 2013.⁸⁹ Everyone involved recognizes that compliance with these rules will be very expensive. Whether it will be economically or technically feasible to build new power plants that comply with EPA’s requirements remains to be seen.⁹⁰ To make its new rule politically palatable and administratively feasible, EPA simply ignored unambiguous provisions of the law that would have required literally millions of sources of greenhouse gasses to apply for new permits.⁹¹ After *Massachusetts v. EPA*, EPA was operating under a mandate from the Supreme Court that both allowed and compelled EPA to rewrite the Clean Air Act.

By the time President Obama took office, it was clear that the signature domestic initiative of the Bush Administration, No Child Left Behind, needed to be revised substantially. Shockingly, after seven years of new federal mandates, not every student in the country was at or above the national average. Thousands of schools across the nation were facing serious sanctions for failing to meet standards no longer considered feasible or sensible.⁹² Nonetheless, Congress has failed to amend the law.

⁸⁶ John M. Broder, *Obama, Who Vowed Rapid Action on Climate Change, Turns More Cautious*, N.Y. TIMES, Apr. 11, 2009, at A10.

⁸⁷ *Id.*

⁸⁸ R. SHEP MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT 71-112 (1983).

⁸⁹ Michael D. Shear, *Administration Presses Ahead with Limits on Emissions from Power Plants*, N.Y. TIMES, Sept. 19, 2013, at A19.

⁹⁰ *See id.* (discussing the potential cost and practical difficulties of implementing carbon capture systems).

⁹¹ WALLACH, *supra* note 76, at 9-10.

⁹² Martha Derthick & Andy Rotherham, *Obama’s NCLB Waivers: Are They Necessary or Illegal?*, 12 EDUC. NEXT 57, 61 (2012); Michele McNeil, *Are 82% of Schools ‘Failing’ Under NCLB, as Duncan Warned?*, EDUC. WK., http://blogs.edweek.org/edweek/campaign-k-12/2011/08/are_82_of_schools_failing_unde.html (last updated Aug. 3, 2011), archived at

That inaction did not mean that the federal education policy everyone conceded was outmoded remained intact. Congress included nearly five billion dollars for the Obama Administration's "Race to the Top" initiative in the 2009 stimulus bill.⁹³ Later the Obama Administration offered to grant states waivers from the onerous requirements of NCLB (as the act clearly authorized), but made granting of waivers conditional on the states' acceptance of school reform "principles" announced by Secretary of Education Arne Duncan.⁹⁴ NCLB makes no provision for such conditional waivers, which in effect allowed the Secretary of Education to rewrite the law. Here again, inaction by Congress did not produce policy *stasis*, but rather further temporizing and experimentation by the executive branch.

Secretary Duncan used the stimulus money to encourage (or bribe) states to use the emerging Common Core curriculum and to develop tests based on this curriculum. Forty-four states have done so.⁹⁵ This is an example of an increasingly common but seldom noted phenomenon: the development of national policy without an explicit mandate from Congress, the executive, or the federal judiciary.

The most significant example of this strange form of policymaking is the multistate tobacco settlement of 1998.⁹⁶ Those looking for evidence of gridlock in Washington might point to the 105th Congress, when an end-of-session Senate filibuster killed legislation passed by the House that imposed a very large tax on tobacco products and severely limited tobacco advertising and marketing. But soon thereafter state attorneys general throughout the country negotiated an agreement with tobacco companies that established a \$250 billion tax on tobacco products – to be dispersed to state treasuries – together with unprecedented limits on advertising, sponsorships, and lobbying by tobacco companies.⁹⁷ After it became clear that they would lose novel "unjust enrichment" suits in a few state courts, the tobacco companies looked for a way to settle the rapidly multiplying claims. Once a few states had hammered out an agreement that would raise tobacco prices nationwide, all the other states joined in. None of the states wanted to see their citizens taxed and have the proceeds go elsewhere. Having lost narrowly in one arena, antitobacco activists prevailed in another.⁹⁸ Multistate litigation by state attorneys general has also left its mark on environmental and consumer protection, pharmaceutical regulation, and Medicaid reimbursement policy.⁹⁹

<http://perma.cc/ALE9-KAKG>.

⁹³ See *supra* note 67 and accompanying text.

⁹⁴ Derthick & Rotherham, *supra* note 92, at 57.

⁹⁵ *Id.* at 58.

⁹⁶ MARTHA A. DERTHICK, UP IN SMOKE 174 (3d ed. 2012).

⁹⁷ *Id.*

⁹⁸ *Id.* at 1, 84-85, 145-47, 164-83, 223-24.

⁹⁹ Paul Nolette, *Advancing National Policy in the Courts: The Use of Multistate Litigation by State Attorneys General* (Aug. 2011) (unpublished Ph.D. dissertation, Boston

We usually think of federalism as a barrier to the expansion of national programs. But in many instances the opposite is true. When the Securities and Exchange Commission was criticized for being too lax in regulating Wall Street, another state attorney general, the now infamous Eliot Spitzer, stepped into what he perceived as a policy void. Given the concentration of the financial sector in his state, Spitzer could, in effect, establish national standards by filing multiple suits under an exceptionally vague state law, New York's Martin Act.¹⁰⁰ In addition, the U.S. Supreme Court has ruled that state tort law can add a level of regulation of pharmaceuticals on top of that established by the Food and Drug Administration (FDA).¹⁰¹ This means that companies serving a national market must follow the most restrictive state rules or face huge potential damages in state court suits. California, a particularly large domestic market, has also frequently imposed environmental standards more stringent than those of the federal government, and many other states have followed its lead.¹⁰²

Over the past several decades the politically unpopular, means-tested Medicaid program has grown faster than the supposedly sacrosanct Medicare program. Why? After all, the former serves the poor, while the latter provides benefits to one of the most potent political forces in American politics, the elderly. According to Lawrence Brown and Michael Sparer of the Columbia School of Public Health, part of the explanation is the shrewd incrementalism of congressional entrepreneurs, such as Henry Waxman, who steadily added federal Medicaid mandates to budget reconciliation bills in the late 1980s.¹⁰³ Even more importantly, Brown and Sparer argue, "fiscal federalism" had the dual effect of "prompting coverage expansions during good times (the feds paid most of the bill) and deterring cutbacks even in bad times (every state dollar saved meant two or three federal dollars lost)."¹⁰⁴ Instead of promoting a "race to the bottom," our post-New Deal "cooperative federalism" has

College Department of Political Science) (on file with author).

¹⁰⁰ N.Y. GEN. BUS. LAW §§ 352-353; BROOKE A. MASTERS, SPOILING FOR A FIGHT: THE RISE OF ELIOT SPITZER 73-132 (2006).

¹⁰¹ *Wyeth v. Levine*, 555 U.S. 555, 581 (2009) ("[I]t is not impossible for Wyeth to comply with its state- and the federal-law obligations and that [plaintiff's] common-law claims do not stand as an obstacle to the accomplishment of Congress' purposes in the FDCA.").

¹⁰² DOUGLAS S. EISINGER, SMOG CHECK: SCIENCE, FEDERALISM, AND THE POLITICS OF CLEAN AIR 7-8 (2010).

¹⁰³ Lawrence D. Brown & Michael S. Sparer, *Poor Program's Progress: The Unanticipated Politics of Medicaid Policy*, 22 HEALTH AFF. 31, 36-37 (2003) ("In Waxman's own words, 'Incrementalism may not get much press, but it does work.'").

¹⁰⁴ *Id.* at 36. Others have reached the same conclusion. See AARON WILDAVSKY, THE NEW POLITICS OF THE BUDGETARY PROCESS 303-08 (2d ed. 1992); Michael S. Greve, *Washington and the States*, FEDERALIST OUTLOOK (May 2003), <http://www.aei.org/outlook/politics-and-public-opinion/federalism/washington-and-the-states>, archived at <http://perma.cc/X3P5-WPRB>.

stimulated expansion of the welfare state. This effect is not limited to health care. After studying federalism for many years, Richard Nathan has concluded that “U.S. federalism’s dominant effect has been to expand the scope and spending of the social sector.”¹⁰⁵

One could easily add example after example of federal administrators, federal judges, and state officials engaging in substantial policymaking independent of Congress. Each month the Federal Reserve buys eighty-five billion dollars worth of bonds to stimulate the economy and promote job growth.¹⁰⁶ The Dodd-Frank Act requires various federal regulatory agencies to undertake nearly 250 rulemaking proceedings in the coming years, but offers virtually no legislative standards to guide them.¹⁰⁷ Remarkably, Congress has even relinquished budgetary control over some of these regulatory bodies, authorizing them to receive their funding from regulated firms or from the Federal Reserve.

How did affirmative action – highly unpopular with the American public – become embedded in so many federal programs? Slowly, subtly, and at times surreptitiously, a long series of court decisions, agency rules, and complex legislative provisions inserted the presumption of proportional representation into federal civil rights programs.¹⁰⁸ How did the federal government come to set national standards for state mental institutions, schools for the developmentally disabled, nursing homes, and prisons? Largely through litigation and consent decrees negotiated by the Department of Justice.¹⁰⁹ How did the Obama Administration manage to set up a twenty-billion-dollar fund to compensate those injured by the BP oil spill? By convincing BP that it would fare much worse if it tried to defend tort suits in state courts, federal courts, and the court of public opinion.¹¹⁰ How did the Department of Education

¹⁰⁵ Richard P. Nathan, *At the Intersection of Health, Health Care and Policy*, 24 HEALTH AFF. 1458, 1459 (2005).

¹⁰⁶ Joshua Zumbrun & Jeff Kearns, *Fed Keeps \$85 Billion QE Pace Looking for Stronger Growth*, BLOOMBERG (Oct. 30, 2013, 6:42 PM), <http://www.bloomberg.com/news/2013-10-30/fed-keeps-85-billion-qe-pace-awaiting-signs-economy-picks-up.html>, archived at <http://perma.cc/GMM2-DG22>.

¹⁰⁷ See *supra* notes 58-60 and accompanying text.

¹⁰⁸ HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960-1972* (1990); JOHN DAVID SKRENTNY, *THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE, AND JUSTICE IN AMERICA* (1996).

¹⁰⁹ See *CRIPA Activities in FY 2001*, DEP’T JUST. (Mar. 2, 2014, 10:17 PM), <http://www.justice.gov/crt/about/spl/documents/cripa01.php>, archived at <http://perma.cc/P7VP-HNGF>.

¹¹⁰ Justin Blum & Jim Snyder, *BP, U.S. Agree on Establishment of \$20 Billion Gulf of Mexico Spill Fund*, BLOOMBERG (Aug. 9, 2010, 11:50 AM), <http://www.bloomberg.com/news/2010-08-09/bp-20-billion-oil-spill-compensation-fund-agreement-completed-with-u-s-.html>, archived at <http://perma.cc/H4M-RS8F> (explaining the negotiations involved in setting up this fund); *Compensating the People and Communities Affected*, BP, <http://www.bp.com/en/global/corporate/gulf-of-mexico-restoration/deepwater-horizon-accident-and-response/compensating-the-people-and-communities-affected.html> (last visited Feb. 3, 2014),

develop rules regarding bullying on elementary school playgrounds, sexual relations between college students, and the definition of competitive, intercollegiate sports? Through a long series of court decisions, “dear colleague” letters, and administrative guidelines, with each institution building on the work of the other.¹¹¹ As a result, the United States has more extensive prohibitions against discrimination based on race, gender, and disability than any other advanced industrialized democracy.¹¹²

Over the past two decades we have witnessed a remarkable social transformation in this country. In the 1990s we ended the ban on gays in the military, and in the early years of the Obama Administration we ended “don’t ask, don’t tell.” Within the past ten years the number of states recognizing gay marriage has gone from zero to seventeen, covering over one third of the American population.¹¹³ In some states the changes came through court decision, in others by legislation, in a few others by referenda.¹¹⁴ In 2013 the Supreme Court struck down part of the Defense of Marriage Act and required the federal government to recognize gay marriage performed in those states.¹¹⁵ An additional three states recognize civil unions for same-sex couples.¹¹⁶ Given the strong support for gay marriage and gay rights among younger voters, this trend is bound to continue. When one considers how long civil marriage has been limited to heterosexual couples, one can only marvel at how quickly public policy in the United States has changed.

Most arguments about gridlock overlook not only the opportunities created by a Constitution that disperses authority, but the extent to which a wide variety of our governmental institutions have developed both the capacity and a taste for policy innovation. We of course have more federal administrative agencies than ever before, and, in comparative perspective, American administrators are notable for an entrepreneurial spirit borne of the necessity of

archived at <http://perma.cc/63KF-UAXN>.

¹¹¹ CHARLES R. EPP, MAKING RIGHTS REAL: ACTIVISTS, BUREAUCRATS, AND THE CREATION OF THE LEGALISTIC STATE 165-214 (2009); R. Shep Melnick, *The Odd Evolution of the Civil Rights State*, 37 HARV. J.L. & PUB. POL’Y 113 (2014).

¹¹² Robert C. Lieberman, *Weak State, Strong Policy: Paradoxes of Race Policy in the United States, Great Britain, and France*, 16 STUD. AM. POL. DEV. 138, 139 (2002).

¹¹³ *States*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/states> (last updated Dec. 20, 2013), archived at <http://perma.cc/W8Y-6V9B>.

¹¹⁴ *Gay Marriage Timeline: History of the Same-Sex Marriage Debate*, PROCON, <http://gaymarriage.procon.org/view.timeline.php?timelineID=000030> (last updated Sept. 18, 2013), archived at <http://perma.cc/WCW6-MBRY> (posting news updates to create a more than forty-year timeline of developments in the gay marriage movement); *Where State Laws Stand*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/pages/where-state-laws-stand> (last visited Feb. 21, 2014), archived at <http://perma.cc/A64H-XLU2>.

¹¹⁵ *United States v. Windsor*, 133 S. Ct. 2675 (2013).

¹¹⁶ *States*, *supra* note 113. Wisconsin has a more limited form of domestic partnership. *Id.*

building their own constituencies.¹¹⁷ Judges hire energetic law clerks eager to apply the theories they learned in elite law schools. Tort lawyers likewise ply them with new legal theories and countless expert witnesses. Judges can call on special masters and compliance review committees to carry out detailed structural injunctions.¹¹⁸ Congressional staff has swelled since the late 1960s, helping to produce statutes of remarkable length and detail. As the action of state attorneys general indicates, state governments have become much more sophisticated, in part because they have been handed so many jobs – and so much grant money – by the federal government. We have also witnessed a proliferation of interest groups and think tanks of all sorts, armed with policy proposals and constituencies primed for mobilization. As the agenda of the national government grew inexorably, our many “separated institutions sharing power” adapted to these new demands and new opportunities. Those who focus exclusively on large-scale legislative change miss most of the action in contemporary American politics.

V. FROM IMPOTENCE TO OVERLOAD

James Madison would have found our current political predicament lamentable, but at least with regard to congressional impasses over the budget not particularly surprising. He had, after all, experienced a much more serious crisis during his own presidency. As Pietro Nivola has shown in recent articles, intense partisanship not only led us into the War of 1812, but made it almost impossible for us to defend our nation against British attack. The 113th Congress may have flirted with default, but the 13th Congress consummated the act: it suspended interest payment on U.S. Treasury bonds in the middle of a war it could not hope to fund through taxation.¹¹⁹

If American politics in 2013 seems dysfunctional, consider the situation during Madison’s presidency. Secretary of the Treasury Gallatin reported to President Madison that in Congress “[m]easures of vital importance have been and are defeated; every operation, even of the most simple and ordinary nature, is prevented or impeded.”¹²⁰ Gallatin concluded that it was impossible “to

¹¹⁷ JOEL ABERBACH ET AL., *BUREAUCRATS AND POLITICIANS IN WESTERN DEMOCRACIES* 8-13 (1981).

¹¹⁸ See R. Shep Melnick, *Taking Remedies Seriously: Can Courts Control Public Schools?*, in *FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY’S ROLE IN AMERICAN EDUCATION* 17 (Joshua Dunn & Martin West eds., 2009).

¹¹⁹ Pietro S. Nivola, *How, Once upon a Time, a Dogmatic Political Party Changed Its Tune*, BROOKINGS (Nov. 14, 2012), <http://www.brookings.edu/research/opinions/2012/11/14-war-1812-nivola>, archived at <http://perma.cc/SR7X-F4MN> [hereinafter Nivola, *Once upon a Time*]; Pietro Nivola, *What the War of 1812 Can Teach Us About the Fiscal Cliff Debate*, ATLANTIC (Nov. 26, 2012), <http://www.theatlantic.com/politics/archive/2012/11/what-the-war-of-1812-can-teach-us-about-the-fiscal-cliff-debate/265488>, archived at <http://perma.cc/QY7J-VTLX>.

¹²⁰ HENRY ADAMS, *THE LIFE OF ALBERT GALLATIN* 434 (1943).

produce the requisite union of views and action between the several branches of government.”¹²¹ According to James Sterling Young, War Hawks in the president’s party “succeeded in pushing the nation into war,” yet congressional committee chairmen refused to report out tax bills and “destroyed the United States Bank by refusing to vote a renewal of its charter.”¹²² This standoff went well beyond the brinkmanship and political theater we have witnessed so often in recent years. Congress slashed appropriations for the Army and Navy and refused to confirm President Madison’s nominee for Secretary of State. “For lack of one congressman’s vote the government ran out of cash, unable to pay the troops. . . . Congress had responded to the emergency by disbanding for summer vacations. . . . The President roamed alone in the countryside while Washington burned, a tragic figure among a receding tide of deserting troops.”¹²³ The economy lay in shambles. Federalist-dominated states in the northeast threatened to secede.¹²⁴ The United States “won” the war only because Britain had never had much interest in fighting us in the first place.¹²⁵ So much for the oft-repeated claim that congressional dysfunction and partisan polarization reached a new low in 2013.

The first lesson we can learn from this comparison is that what we now call “gridlock” is a far cry from political or governmental paralysis. Even during government “shutdowns” we have managed to pay our troops and maintain our national defense. Today our political resolve is weakened by the fact that we face not an immediate “existential threat” such as British invasion and secession by New England states, but rather very long term (and thus highly uncertain) threats such as economic stagnation, educational mediocrity, declining social mobility, crushing debt on coming generations, and global warming. All democracies have difficulty imposing costs on current voters in order to address problems whose effects will be felt only years in the future. Ours is a chronic problem, not yet of crisis proportion.

Second, as Nivola emphasizes, the dominant Republican Party learned from its mistakes, quickly jettisoning “its inordinate distaste for centralized power” and adopting a more Hamiltonian position on the national bank, taxation, internal improvements, and military power.¹²⁶ The Republican Party could do this because parties at the time had virtually no grass roots. They were organized and controlled by party leaders, most notably in this instance, President James Madison. Nivola points out that “[t]oday’s parties, by contrast, are driven from the bottom up.”¹²⁷ Never was this more evident than in the fall of 2013, when a small group of Republican members of Congress pushed their

¹²¹ *Id.*

¹²² JAMES STERLING YOUNG, *THE WASHINGTON COMMUNITY: 1800-1828*, at 182 (1966).

¹²³ *Id.* at 184-85.

¹²⁴ Nivola, *Once upon a Time*, *supra* note 119.

¹²⁵ YOUNG, *supra* note 122, at 185.

¹²⁶ Nivola, *Once upon a Time*, *supra* note 119.

¹²⁷ *Id.*

party and their more pragmatic leaders into a corner from which they could not hope to escape. The power of the Tea Party faction within the Republican caucus came above all from the threat of “primarying” Republicans who refused to follow them off the ledge. Over and over we hear that the central problem with our politics is that politicians are not listening to their constituents. To the contrary, they are paying a great deal of attention to the voters whose support they need to remain in office. The layers of insulation from public passions and from factional demands that Madison defended in *Federalist No. 10* have gradually been stripped away, leaving our elected officials “running scared” and thus poorly equipped to confront long-term problems.¹²⁸

Third, the difficulties President Madison faced in 1812 were in large part the result of American’s weak attachment to the national government. As James Sterling Young has demonstrated, in those days, “[a]lmost all of the things that republican governments do which affect the everyday lives and fortunes of their citizens, and therefore engage their interests” were “*not* done by the national government,” but by states and localities.¹²⁹ “A government continually at a distance and out of sight,” Hamilton warned, “can hardly be expected to interest the sensations of the people.”¹³⁰ The only thing that could secure the allegiance of the citizenry to the national government, Hamilton argued in *Federalist No. 17*, would be a lengthy record of superior administration.¹³¹ Although the national government had very few things to do in the first half of the nineteenth century, it managed to do most of them poorly.

It took a very long time for the federal government to accumulate its current array of responsibilities. Crises and brief periods of energetic party government progressively lowered the “legitimacy barrier,” and fundamentally altered the public’s expectations of government in general and the national government in particular.¹³² An unexpected and largely unappreciated consequence of this has been that public administrators, judges, congressional committee chairs and their staff, governors, state attorneys general, and obscure quasi-governmental organizations have all increased their capacity to expand the reach of national programs. Since the federal government already regulates air pollution that threatens our health, why not have it regulate everything that enters the atmosphere? If Congress will not address the problem of global warming, judges and administrators can. If smoking is a serious threat to public health, and if government subsidizes health care, why not invent new liability rules that force “big tobacco” to change its practices and reimburse government for

¹²⁸ Anthony King, *Running Scared*, ATLANTIC MONTHLY, Jan. 1997, at 279.

¹²⁹ YOUNG, *supra* note 122, at 31.

¹³⁰ THE FEDERALIST NO. 27, *supra* note 8, at 172 (Alexander Hamilton).

¹³¹ THE FEDERALIST NO. 17, *supra* note 8, at 114-15 (Alexander Hamilton).

¹³² JAMES Q. WILSON, AMERICAN POLITICS, THEN AND NOW 8 (Am. Enter. Inst. for Pub. Policy Research 2010) (1979).

the harm it has done? Since the federal government provides so much money to colleges, why shouldn't the Department of Education or federal judges tell them how to order textbooks, evaluate their courses, discipline their students, and decide what constitutes a "sport"? Our political culture changed, the agenda of our politics grew, and our political institutions responded. Unfortunately, our capacity for responding to demands for more services, protections, and guarantees has evolved more rapidly than our institutional mechanisms for reconciling all the competing demands placed on government.

If there is anything that prevents us from thinking seriously about how to nudge our political institutions in the direction of a greater capacity to reconcile the competing demands placed on government, it is our democratic insistence that "the people" are unified, sensible, and selfless, while politicians are fractious, scheming, and interested only in preserving their own power and perks. This is where Madison can be of most help.

In the most frequently read – and ignored – essay ever written on American politics, Madison emphasized that the "latent causes of faction are . . . sown in the nature of man."¹³³ Our "reason" will forever be corrupted by our "self-love."¹³⁴ The "diversity of the faculties of men" is both the primary cause of faction and "an insuperable obstacle to a uniformity of interests."¹³⁵ Madison noted that "the most common and durable source of factions has been the various and unequal distribution of property": those with property and those without; creditors and debtors, "[a] landed interest, a manufacturing interest, a mercantile interest, a moneyed interest," and all the other interests that "grow up of necessity in civilized nations and divide them into different classes, actuated by different sentiments and views."¹³⁶ Today we could add to the list of diverse types of property not just synthetic collateralized debt obligations and patents on organisms and genetic patterns, but the "new property" of Social Security, Medicare, Medicaid, Food Stamp, and myriad other entitlements. We have developed a huge "nonprofit" sector, as well as a Title VII bar, an ADA bar, a tort bar with its own subset of venture capitalists, and even a GITMO bar devoted to expanding the rights of prisoners held at Guantanamo Bay.¹³⁷

Just as importantly, a "zeal for different opinions concerning religion, concerning government, and many other points as well of speculation as of practice; [and] an attachment to different leaders ambitiously contending for pre-eminence and power" have "divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for the common good."¹³⁸ Technological

¹³³ The FEDERALIST NO. 10, *supra* note 8, at 73 (James Madison).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 74.

¹³⁷ GOLDSMITH, *supra* note 56, at 161.

¹³⁸ The FEDERALIST NO. 10, *supra* note 8, at 73 (James Madison).

innovation has made it easier for those who share political passions and temporary rages to join together and make their strident voices heard. Pro-choice and pro-life groups exemplify this religious zeal. Today our politics is animated by both resentment at the “one percent” and disdain for the “forty-seven percent,” scapegoating of immigrants and condescension to those who “cling to their guns and religion,” and visceral hatred of presidents Republican and Democratic.¹³⁹ Madison reminds us that such features of democratic politics are hardly new. He teaches us that thinking about the proper design of democratic institutions require us to face the many dilemmas of governing and some less than edifying features of human nature.

¹³⁹ Frank James, *Comparing Romney’s ‘47 Percent’ Remark and Obama’s ‘Cling to Guns’ Comments*, NPR (Sept. 18, 2012), <http://www.npr.org/blogs/itsallpolitics/2012/09/18/161335578/the-difference-between-romneys-mooching-47-and-obamas-bitter-votersi>, archived at <http://perma.cc/E3ZW-SPSE>.